

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

June 15, 1988

Mr. Gerald H. Teletzke, Director
Arizona Department of Environmental Quality
Central Palm Plaza Building
2005 North Central Avenue
Phoenix, Arizona 85004

Re: I88-066 (R87-206)

Dear Mr. Teletzke:

You have asked what role the Arizona Department of Environmental Quality ("ADEQ") has as grant advance administrator pursuant to 33 U.S.C. §§ 1251 to 1299. You have also asked whether ADEQ must use an intergovernmental agreement pursuant to A.R.S. § 11-951 to make such advances. We conclude that ADEQ is empowered only to pass the federal monies through to the ultimate recipients and not to expend any of the monies itself. We also conclude that ADEQ may not use intergovernmental agreements to accomplish this role.

The advance of funds which is the subject of your inquiry is a component of the Construction Grants Program of the federal Clean Water Act ("the Act"), 33 U.S.C. §§ 1281 to 1376. Pursuant to this program, each state receives an annual allotment from monies appropriated by Congress for the ensuing fiscal year. 33 U.S.C. § 1285. Within the scope of the allotment, the United States Environmental Protection Agency ("EPA") may make various grants to effect the purposes of the Act, including grants to the state, municipalities, or intermunicipal or interstate agencies for the construction of publicly owned treatment works for the management of sewage and other wastes. See 33 U.S.C. § 1281. The Construction Grants Program is administered in Arizona by ADEQ pursuant to a delegation agreement with EPA.

A construction grant includes an allowance for funds expended by the community prior to the grant award for planning,

Mr. Gerald H. Teletzke
June 15, 1988
I88-066
Page 2

engineering and design services. The states are required to reserve a portion of their federal allotments, not to exceed ten percent, for the purpose of advancing such allowance to small communities which are potential grant applicants but which could not otherwise afford the costs associated with facilities planning and design. See 33 U.S.C. § 1281(1). The state must submit a separate grant application for the reserved amount. See 40 C.F.R. § 35.2025(b).

Once the state grant is approved, ADEQ may accept applications for advances of allowance from eligible communities. Application procedures and information requirements are left to the states; however, the municipal applicant must certify (1) that without the advance it would be unable to finance planning and/or design, and (2) that it will carry out the work for which the advance is requested. If ADEQ finds the application acceptable, it may either request that EPA assign payment of the advance directly to the municipality or receive the funds from EPA and disburse them to the municipality. See 40 C.F.R. § 35.2025(b)(2).

If ultimately the municipality does not receive a construction grant the state may, at its discretion, seek repayment of the advance. Any monies thus recovered remain dedicated to advances of allowance and are added to the state's most recent grant for that purpose. See 40 C.F.R. § 35.2025(b)(5).

The purpose of an advance of allowance contract between ADEQ and a qualifying municipality is to enable the municipality to conduct the planning and design activities that are prerequisite to approval of a construction grant under section 201 of the Act, 33 U.S.C. § 1281. ADEQ is authorized by A.R.S. § 49-202(A) to "take all actions necessary to administer and enforce [the Act], including entering into contracts, grants and agreements . . . to secure to this state the benefits, rights and remedies of [the Act]." More specifically, ADEQ is authorized, through the Director, to "[a]dminister state or federal grants, including grants to political subdivisions of this state, for the construction and installation of publicly and privately owned pollutant treatment works and pollutant control devices and establish grant application priorities." A.R.S. § 49-203(B)(3). ADEQ is also charged with the duty to review and approve plans for, and construction of, wastewater treatment systems. See A.R.S. § 49-361.

Mr. Gerald H. Teletzke
June 15, 1988
I88-066
Page 3

ADEQ has the authority to "own or lease land on which sanitary engineering facilities are located, and operate the facilities, if . . . necessary for the public health, safety or welfare" pursuant to A.R.S. § 49-104(B)(9); however, the agency is not authorized to plan and construct such systems for its own purposes. ADEQ has no authority to expend the federal monies it receives pursuant to 40 C.F.R. § 35.2025(b) for any purpose other than as advances to municipalities. See 40 C.F.R. § 35.2025(b)(5).

We conclude that the ADEQ's role is to administer and police the use of the advance funds pursuant to 33 U.S.C. §§ 1281 to 1299. However, ADEQ possesses no power to use the funds itself for any purpose and no power to otherwise plan and construct wastewater treatment systems.

We now turn to the question of whether an intergovernmental agreement is the proper instrument to make these grant advances. A.R.S. § 11-952(A) provides in pertinent part:

If authorized by their legislative or other governing bodies, two or more public agencies by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action

We have previously stated that the essence of an intergovernmental agreement lies in the joint exercise of a governmental or proprietary function common to the contracting parties. See Ariz.Atty.Gen.Ops. I83-057, I79-193. Thus, an intergovernmental agreement involves (1) two or more public agencies (2) with authority over a common power (3) acting jointly to perform that power.

In Ariz.Atty.Gen.Op. I79-193, we determined that a contract whereby a state agency distributed grant monies to public entities was not an intergovernmental agreement. As stated in that opinion, "[w]here the agency is authorized only to distribute funds . . . and has no independent power to spend the funds for its own projects, the recipient agency has the sole authority to utilize the grant award" The same

Mr. Gerald H. Teletzke
June 15, 1988
188-066
Page 4

rationale applies here. ADEQ is not empowered to use the funds which it distributes pursuant to the grant advances. The municipality shares no common power with ADEQ which the two can jointly exercise. Therefore, the intergovernmental agreement statutes do not apply and an agreement for disbursing grant advances may not be in the form of an intergovernmental agreement.

Sincerely,



BOB CORBIN
Attorney General

BC:NJJ:pcd